85-587

Supreme Court, U.S.
FILED
OCT 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner

v.

TOMMY WAYNE DUNN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

WINSTON E. COCHRAN, JR.
Assistant District Attorney
Harris County, Texas

CALVIN A. HARTMANN
Assistant District Attorney
Harris County, Texas
Chief of the Appellate Section
Counsel of Record

201 Fannin, Suite 200
Houston, Texas 77002
Tel.: 713/221-5826
Attorneys for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I

QUESTION PRESENTED

IF A SUSPECT UNDER INTERROGATION VOLUNTARILY WAIVES COUNSEL BUT IS NOT INFORMED THAT A LAWYER IS IMMEDIATELY AVAILABLE TO CONSULT WITH HIM, IS HIS CONFESSION INADMISSIBLE?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
TABLE OF AUTHORITIES	III
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AT ISSUE	5
STATEMENT OF THE CASE	6
I. Proceedings in the Trial Court	6
II. Appellate Proceedings	6
REASONS FOR GRANTING THE WRIT	7
A. The Factual Background	7
B. The Ratio Decidendi of the Plurality	9
C. What Type of "Knowing" Waiver Is Required?	12
D. Application of the Standard	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L.Ed. 2d 424 (1977) 10
Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985) ..2, 4, 11, 12, 16, 17
Couch v. United States, 409 U.S. 322, 93 S. Ct. 611, 34 L.Ed.2d 548 (1973) 10
Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981) 15, 17
Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984) 4, 11
Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964) 6, 18, 19
Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938) ..... *passim*
Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972) 10
Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983) 3
Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 297 (1966) ..... *passim*
Moran v. Burbine, ____U.S.____, 105 S. Ct. 2319, ____ L.Ed.2d____ (1985) 2, 4, 7
North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755, 60 L.Ed.2d 286 (1979) 2, 12, 15
United States v. Gouveia, ____U.S.____, 104 S. Ct. 2292, 81 L.Ed.2d 146 (1984) 10
United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982) 15
United States v. Moore, 485 F.2d 1165 (5th Cir. 1973) ... 10
Weber v. State, 457 A.2d 674 (Del. 1983) 11, 12, 15, 16

CONSTITUTIONAL PROVISIONS

Amendment Five, United States Constitution .....
.....2, 4, 5, 9, 10, 11, 12, 14, 18
Amendment Fourteen, United States Constitution 2, 5, 10

STATUTES AND RULES

Tex. Cr. App. R. 310 3
Tex. Cr. App. R. 311 2
V.T.C.A., Penal Code, Section 19.03(a)(3) 6
28 U.S.C. Section 1257(3) 2

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner

v.

TOMMY WAYNE DUNN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of The State of Texas v. Tommy Wayne Dunn, number 248-84 in the court below, which reversed Respondent's conviction for murder.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas in this cause, No. 248-84 on the docket of that court, is reproduced in the Appendix "A". The opinion is not yet commercially reported.

JURISDICTION

The Court of Criminal Appeals rendered its decision on June 26, 1985. The State timely filed its motion for rehearing. The Court of Criminal Appeals denied the motion for rehearing on July 24, 1985. Thereupon the State filed a motion to stay issuance of the mandate by the Court of Criminal Appeals, pursuant to Tex. Cr. App. R. 311. A stay of the mandate for sixty days was granted on August 9, 1985.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), which states in part that "a final judgment by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court . . . by writ of certiorari, . . . claimed under the Constitution . . . of the United States." The decision of the Court of Criminal Appeals resulted from the agreement of a plurality opinion and three concurring opinions that the Respondent's conviction should be reversed. One concurring judge relied exclusively on Texas law, but the other opinions were based on the Fifth and Fourteenth Amendments of the United States Constitution and Supreme Court caselaw, primarily *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 297 (1966), *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L.Ed.2d 286 (1979), and *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). The plurality also relied heavily on a federal court of appeals opinion, *Burbine v. Moran*, 753 F.2d 178 (1st Cir. 1985). This Court has already recognized the existence of an important constitutional question in *Burbine* by granting a writ of certiorari in that case on May 13, 1985. *Moran v. Burbine*, ____U.S.____, 105 S. Ct. 2319, ____L.Ed.2d____ (1985). Thus there was no independent

state law basis for the Court of Criminal Appeals' decision under the rule of *Michigan v. Long*, 463 U.S. 1032, 103 S Ct. 3469, 77 L.Ed.2d 1201 (1983):

> . . . when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

The time for filing this petition expired on September 23, 1985. The Petitioner respectfully requests this Court to waive the time limit imposed by Rule 20 in this cause for the following reasons:

(1) The failure to timely file this petition was due to an error in time calculation by the Assistant District Attorney assigned to prepare this case, who incorrectly relied on Texas Criminal Appellate Rule 310, regarding finality of decisions, for determining when the sixty-day time period for filing commenced. The Petitioner apologizes for this mistake.

(2) The time limit established in Rule 20 is not jurisdictional. This Court has full authority to waive said rule. Such a waiver should only be granted in situations where the importance and urgency of the constitutional issues presented outweigh the inconcenience to this Court and where the Respondent would suffer no disadvantage. This cause presents such an exceptional situation:

(a) *Importance.* This cause presents an important question of constitutional law. This Court has already

granted certiorari in *Moran v. Burbine*, a case which presents similar facts and legal issues. The Court of Criminal Appeals acknowledged that fact but proceeded with this cause without waiting for this Court's guidance in *Burbine*. This Court should grant certiorari herein if for no other reason than preserving its supremacy.

Moreover, there are two reasons why this cause has distinctive importance which makes it a worthy companion for *Moran v. Burbine*. (i) In reconciling its opinion in *Burbine v. Moran* with an earlier opinion in *Fuentes v. Moran*, 733 F.2d 176 (1st Cir. 1984), the First Circuit declared that "a few critical facts" could be decisive. 753 F.2d at 186. If that is true, the additional nuances of this issue presented by this cause may help this Court resolve the issue. For example, this cause presents an arrestee who was at the opposite end of the socio-economic spectrum from Mr. Burbine. This Respondent was personally acquainted with one of the attorneys attempting to see him. This cause raises the distinct question of the significance of an express motive to confess. In short, the mix of factors is different. (ii) in this petition, the Petitioner recommends an approach to the question of a "knowing" waiver which may prevent the need for this Court and other appellate courts to devote much future time and attention to such factual nuances. Specifically, *the Petitioner submits that the Fifth Amendment only requires a knowing waiver of the abstract right to counsel.*

(b) *Judicial Economy*. Because *Burbine* is already before this Court, consideration of this cause would not create substantial inconvenience for this Court. *Miranda* itself, which actually was a consolidated opinion of several

decisions, is an example of the judicial economy inherent in addressing several related cases simultaneously.

(c) *Disadvantage to Respondent.* The Respondent is presently incarcerated in the Texas Department of Corrections under a sentence of imprisonment for 99 years. The Court of Criminal Appeals did not order the prosecution dismissed. Even under the most lenient parole practices available in Texas, the Respondent would not be eligible for parole within the few additional months necessary for this Court to consider and decide the issue presented in this petition.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

The Fourteenth Amendment of the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

The Respondent was indicted for the capital murder of his father, A. D. Dunn, under V.T.C.A., Penal Code, Section 19.03(a)(3). The trial court conducted a hearing pursuant to *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964), to determine the admissibility of the Respondent's confession and held that the confession was admissible. On July 13, 1982, the Respondent entered a plea of not guilty to the lesser included offense of murder. The State presented the Respondent's confession and a statement by another witness as evidence, whereupon the trial court found the Respondent guilty of murder. The court assessed punishment at imprisonment for 99 years in the Texas Department of Corrections.

II. Appellate Proceedings

The Respondent's conviction was appealed to the Court of Appeals for the First Supreme Judicial District of Texas at Houston, which transfered this cause to the Court of Appeals for the Tenth Supreme Judicial District at Waco. On January 12, 1984, the Court of Appeals for the Tenth Supreme Judicial District affirmed the Respondent's conviction. The Respondent petitioned the Court of Criminal Appeals for discretionary review, and the State

filed a response agreeing that this cause merited discretionary review. Review was granted on June 13, 1984.

On June 26, 1985, the Court of Criminal Appeals reversed the decision of the Court of Appeals. Three judges joined in a plurality opinion, while three other judges filed separate concurring opinions. Three judges dissented without a written opinion. The plurality and the concurrences agreed that the Respondent's confession should have been suppressed because the Respondent did not make a knowing waiver of his right to counsel. The plurality opinion acknowledged that a similar question is before this Court in *Moran v. Burbine, supra,* but apparently decided not to wait for this Court's decision in *Burbine.* The State filed a motion for rehearing, which was denied without written opinion on July 24, 1985. Four judges dissented from the denial of the motion for rehearing. The State then filed a motion for a stay of the mandate, which the Court of Criminal Appeals granted.

REASONS FOR GRANTING THE WRIT

A. The Factual Background

In order to understand the issue presented here, it is necessary to review the facts in some detail. The Respondent and his father, A. D. Dunn, owned and operated a swage manufacturing company, Swageco, on the outskirts of Houston. On October 12, 1981, the Respondent's father was gunned down as he prepared to enter a motel room with a female employee, Robin Buchanan. On the afternoon of October 13, 1981, a Houston police detective, C. W. Kent, drove out to Swageco and asked the Respondent to come to the Houston Police headquarters that evening. After closing his business, the Respondent

voluntarily went to the police station. There he was given *Miranda* warnings by Kent and advised that he was a suspect in his father's death. Kent placed the Respondent in a lineup, although the record does not show what witnesses viewed the lineup.

Following the lineup, the Respondent was placed in an interview room in the homicide detective offices and questioned by Kent for several hours. Kent then prepared a written confession dictated by the Respondent, beginning at 10:35 p.m. and lasting until 12:17 a.m. This statement contained a written set of Miranda warnings which the Respondent acknowledged by writing his initials. At no time did the Respondent ever tell the police that he wanted to consult counsel or terminate the interview.

According to the Respondent's confession, A. D. Dunn's personal life was ruining Swageco's business. The Respondent said his father damaged morale by distinct favoritism for female employees who had sex with him. The confession stated that one female employee, Robin Buchanan, "started digging for gold," first trying to lure the Respondent, then turning her attention toward A. D. Dunn. The Respondent finally decided that A. D. Dunn would have to be killed:

> Finally things started to become unbearable, that is the time when I started to thinking about getting him bumped. I couldn't talk rationally with him. I just had enough.

The Respondent arranged for a "hit man" to kill A. D. Dunn. On October 12, 1981, the Respondent personally drove the gunman to the motel where A. D. Dunn was shot. Then the Respondent paid the gunman eight hundred dollars.

Around 8 p.m. the Respondent's wife, having heard that the Respondent had gone to the police station, called police headquarters and asked if her husband was there. Repeated phone calls only obtained answers that the Respondent was not there. Around 10:00 p.m. Mrs. Dunn telephoned a civil attorney, Ted Schultz, who had done legal work for the Respondent and his wife in the past. Schultz in turn enlisted the aid of an experienced criminal attorney, Stanley Schneider, and the two attorneys went to the police station.

When the attorneys arrived at the police station at around 11:00 p.m., they were at first directed to the jail area, only to learn that the Respondent was not in the jail. Schultz and Schneider went to the detective offices. There Houston Police Lieutenant Zoch told the attorneys that they could not see the Respondent because the Respondent was in the middle of giving a confession and had not asked for an attorney. Zoch said the Respondent "was talking freely and willingly, and I saw no point in stopping the investigation at that point." Zoch candidly admitted that he was concerned that the Respondent might not continue giving his confession if the lawyers were allowed to talk to the Respondent. Schneider asked Zoch to contact an assistant district attorney and ask permission to admit the two attorneys, but the assistant district attorney agreed with Zoch that the lawyers should not be admitted. The Respondent was never made aware of the presence of the two attorneys at the police station until after he signed his confession.

B. The Ratio Decidendi of the Plurality

The Respondent presented two main lines of attack on appeal, claiming infringement of both the Fifth Amend-

ment and Sixth Amendment rights to counsel, as made applicable to the states by the Fourteenth Amendment. The Sixth Amendment contention was clearly without merit because formal proceedings against the Respondent had not been initiated at that time. *Kirby v. Illinois,* 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972); *United States v. Gouveia,* ____U.S.____, 104 S. Ct. 2292, 81 L.Ed.2d 146 (1984). In contrast to the facts in *Brewer v. Williams,* 430 U.S. 387, 399, 97 S. Ct. 1232, 1239-1240, 51 L.Ed.2d 424 (1977), there had been no warrant, arraignment, or other judicial proceeding involving the Respondent at this point. No State's pleading had been filed. The Court of Criminal Appeals focused instead on the Fifth Amendment question, which had two aspects: (1) Could the attorneys invoke the Respondent's Fifth Amendment privilege? and (2) Was the Respondent's own waiver of his Fifth Amendment right to counsel a voluntary waiver?

The Court of Criminal Appeals correctly held that the privilege of an accused against self-incrimination is a personal one which may not be invoked by someone else on behalf of the accused. This Court has so held in another context in *Couch v. United States,* 409 U.S. 322, 93 S. Ct. 611, 34 L.Ed.2d 548 (1973), wherein an accountant was not allowed to invoke the Fifth Amendment privilege for his client, Couch, when the Internal Revenue Service attempted to obtain Couch's business records. It should make no difference that the third party attempting to vicariously assert the Fifth Amendment for a client happens to be an attorney. The Fifth Circuit cited *Couch* in *United States v. Moore,* 485 F.2d 1165 (5th Cir. 1973) in holding that an attorney could not assert a Fifth Amendment privilege in his client's papers. Other

state appellate courts have held that attorneys could invoke a suspect's Fifth Amendment privilege during custodial interrogation. For example, the Delaware Supreme Court so held in *Weber v. State,* 457 A.2d 674 (Del. 1983), and the Court of Criminal Appeals' plurality opinion cites several other cases reaching the same conclusion. The plurality opinion specifically rejected this view. The plurality held that attorneys Schultz and Schneider could not assert the Respondent's Fifth Amendment right to counsel prior to and during custodial interrogation.

Turning to the second aspect of the Fifth Amendment question, it was undisputed that the Respondent waived his right to counsel. The Court of Criminal Appeals plurality specifically held that the waiver was voluntary. Nevertheless, the Court of Criminal Appeals held that this waiver was not a "knowing" waiver. In so concluding, the plurality rejected the holding in *Weber,* 457 A.2d at 686, that a suspect must be informed of the actual presence and availability of counsel before any waiver of counsel can be considered knowing and intelligent. Instead the plurality undertook a balancing approach in the manner of the First Circuit, in *Fuentes, supra* and *Burbine, supra.* Whether the plurality actually balanced the factors correctly, or whether the plurality in effect applied the *Weber* test it had just rejected, is discussed in Part D, *infra.* The concurring opinion of Judge Teague specifically endorsed the *Weber* test. Judge Clinton's concurrence opined that "the *Weber* rule ought not to be rejected out of hand." Judge Miller's concurrence found the *Weber* approach too precise and too rigorously structured. That is, *Weber* apparently does not go far enough to suit Judge Miller. Despite their differing perspectives,

the plurality opinion and the concurring opinions agreed that the Respondent could not make a "knowing" waiver if he was not informed that legal counsel was virtually outside the door. Thus, the majority of the Court concluded that the Respondent's voluntary confession should have been suppressed.

C. What Type of "Knowing" Waiver is Required?

Like *Burbine* and *Weber,* this cause hinges on a determination of whether the Respondent made a knowing waiver of his Fifth Amendment right to counsel. Before examining whether the waiver standard was correctly applied, the Petitioner first submits that the Court of Criminal Appeals misunderstood the standard. The plurality extracted the standard it applied from *North Carolina v. Butler,* 441 U.S. at 373: "The question is . . . whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." In that case a North Carolina robbery suspect was arrested in New York and given *Miranda* warnings and a special FBI warning. There was a factual issue as to whether Butler ever acknowledged that he understood the warning that he had the right to counsel before and during interrogation. The term "knowingly" used in *Butler* should not be read as going beyond the issue before the Court, i.e. whether Butler actually ever became aware of his *Miranda* right to counsel. The dispute in *Butler* boiled down to whether a waiver must be explicitly articulated. *Butler* itself gives no guidance as to what a suspect must "know" beyond the obvious requirement that he somehow indicates that he knows what the officer administering a *Miranda* warning is telling him.

There is, of course, no reference to "knowing" waivers in the Constitution itself. Rather, the requirement of a knowing waiver is generally thought to stem from the test for a waiver of trial counsel expressed in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461 (1938): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." The next sentence in *Johnson v. Zerbst* further refers to an "intelligent" waiver: "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* These statements merely beg the question: What is a suspect required to know? What makes a waiver "intelligent"? Clearly a suspect must know about the right itself; that much is explicit in the *Johnson v. Zerbst* reference to a "known right." The assurance that a suspect has that knowledge is a primary function of the *Miranda* requirement that rights be recited to suspects. The reference to an "intentional" waiver cannot be read as a requirement that a suspect be informed of all circumstances which might affect his judgment; intent is a concept which focuses on the desire of a person to act, not on how well informed or wise that decision is. The word "intelligent" is, to say the least, ambiguous. Even scientific concepts of intelligence regard intelligence as something that is measured in degrees.

Miranda itself sheds little light on this question. The *Miranda* majority opinion "reassert(ed) these (*Johnson v. Zerbst*) standards as applied to in-custody interrogation." 384 U.S. at 475. Yet *Miranda* offered very little explanation of what was required to show an "intelligent"

waiver. The two references to a "knowing" waiver in *Miranda* do not go beyond the point where counsel is either requested or waived following the warnings. First the term was used in the context of police disregard for an actual request for counsel:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Later, in its summary at 384 U.S. 479, the majority opinion stated:

> Opportunities to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given and such opportunity afforded to him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.

Nothing in either statement requires a suspect to be continually advised of all new circumstances which might conceivably affect his decision.

The Petitioner submits that the Fifth Amendment requires nothing more than that a suspect who is to be interrogated have an understanding of his right to consult counsel. This right is an abstract right—the power to defer interrogation pending the hiring of a specific attorney or the appointment or hiring of a randomly selected attorney. Whether or not a particular attorney is immediately available should be of no moment, for once the right to counsel is invoked, all interrogation must cease

until (1) counsel is provided or (2) the suspect initiates further interrogation. If counsel is outside the door, he will have rapid access to the suspect. On the other hand, a suspect may request counsel who is half a continent away, and that is sufficient to terminate questioning. *United States v. Hinckley,* 672 F.2d 115 (D.C. Cir. 1982). Neither *Butler* nor *Johnson v. Zerbst* should be construed as requiring anything more than that a suspect understand and waive the abstract Fifth Amendment right to counsel. Even the erroneous *Weber* opinion tacitly conceded that the *Miranda* right to counsel is this abstract right:

> We can not (sic), and do not, conclude that a suspect, who is indifferent to the usual abstract offer of counsel, recited as part of the warnings required by *Miranda,* will disdain a chance to consult a lawyer waiting to see him then and there.

Why did the Delaware court assume the Constitution requires more than the rights covered by the *Miranda* warnings? If anything, the majority opinion in *Miranda* was too expansive, not too narrow.

D. Application of the Standard

In attempting to apply a balancing test to this issue, the Court of Criminal Appeals paid lip service to this Court's caselaw which dictates that the waiver issue should be examined in light of all the circumstances, including the background, experience and conduct of the accused. *Johnson v. Zerbst, supra; Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981). In reality, the Court of Criminal Appeals assigned controlling weight to but one factor, the proximity of counsel.

In that respect, the decision in this cause more closely resembles *Weber* than *Burbine*.

All other factors which belong in the equation favor the trial judge's conclusion that the confession was voluntary:

(1) The Respondent's background. The Respondent was certainly of greater intelligence than the average criminal suspect, having helped establish and operate a successful business enterprise. Burbine, for example, was less well educated than the Respondent herein.

(2) Coercive aspects of interrogation. The policy foundation of the *Miranda* decision was the potential for coerced confessions, due to actual force or merely due to the coercive atmosphere inherent in a custodial interrogation setting. There was absolutely no evidence of such coercive pressures at work in the interrogation of the Respondent. The Respondent voluntarily came to the police station at his own convenience. Officers testified that the Respondent was cooperative. There was no testimony indicating that any of the interrogation techniques discussed disapprovingly in the *Miranda* opinion were employed.

(3) *Miranda* warnings. The record shows that the Respondent received *Miranda* warnings and indicated that he understood them. The face of the confession bears a written waiver of the rights set forth in the *Miranda* warnings, including a waiver of the right to counsel prior to and during interrogation.

(4) Other indicia of the Respondent's desire for counsel. Where a suspect indicates that he desires the assistance of counsel, the police must discontinue in-

terrogation until counsel is provided or until the suspect initiates further conversation and clearly waives counsel. *Edwards v. Arizona, supra.* There is no evidence that the Respondent ever indicated that he wanted to consult counsel before or during the interview. The Respondent was certainly familiar with the use of attorneys, since the confession itself mentions that the Respondent had utilized the services of another attorney—one Jim Saccomono, not Schultz or Schneider—in the past. There is simply no indication that the Respondent wanted to consult counsel in this instance.

(5) Motive to confess. One factor which received little attention from the First Circuit in *Burbine v. Moran* was the existence and strength of motive to confess. In this cause the Court of Criminal Appeals totally disregarded the Petitioner's argument that the confession itself shows that the Respondent had personal motives for giving this confession. The Respondent orchestrated a monstrous act, the murder of his own father, and it is reasonable that he would feel at least some guilt for that. He also may have felt some sort of obligation to justify his actions to his mother, his wife, or his business associates. The content and tone of the confession show it to be a self-righteous attempt to justify this parricide. Like the deranged judge in Agatha Christie's *And Then There Were None,* the Respondent apparently felt compelled to explain his reason for committing this crime in great detail. Viewed objectively, the reasoning expressed in the confession falls far short of justifying murder, but that does not detract from the apparent sincerity of the Respondent's belief.

It might be argued that motive goes only to the issue of voluntariness, as opposed to a discrete inquiry into

a knowing waiver of counsel. The Petitioner disagrees with that view for two reasons: (a) the only knowing waiver required goes to the abstract right to counsel mentioned in the warnings; and (b) the argument ignores the purpose of the Fifth Amendment right to counsel in the first place—to counteract the coercive potential of custodial interrogation.

Arrayed against all these factors is the one factor of proximity of counsel. The Court of Criminal Appeals assumes that the Respondent might have decided to talk to attorneys who were readily available, although there was no evidence of that. The Respondent certainly could have testified to that effect at the *Jackson v. Denno* hearing, but he did not. Even granting that the burden of proof is on the State, the State certainly should not be required to negate speculation as to what a defendant might have thought under a hypothetical set of circumstances.

Should the proximity of Schultz and Schneider make any difference at all? As suggested in Part C above, the *Miranda* warnings necessarily deal with the right to counsel as an abstraction; the police simply cannot discuss with each suspect the strategic merits of consulting any particular attorney. *Miranda* itself states that this Court did not intend to create the need for a "station house lawyer." *Miranda,* 384 U.S. at 474. Yet a much worse result could occur if a suspect must be advised of the presence of every private attorney who shows up at the police station and asks to see him. For that matter, what difference could there be between an attorney who appears at the police station and one who telephones? In effect the decision of the Court of Criminal Appeals permits attorneys who ask to see suspects to determine

whether an interrogation can continue, since officers would ignore the attorney's request at the peril of suppression. It safely may be predicted that many suspects, based on hindsight, would testify at the *Jackson v. Denno* hearing that they would have wanted to consult that attorney. As a practical matter, the Court of Criminal Appeals' decision herein achieves the same result as letting a third person invoke the suspect's rights.

The fact that counselor Schultz had once worked for the Respondent in the past does not mean the presence of Schultz would have been of particular significance in the Respondent's decision-making. On the contrary, since the Respondent obviously knew of Schultz, it is reasonable to think that the Respondent would have asked for Schultz if he had wanted him.

Under a proper balancing test, the mere proximity of the attorneys is not enough to lead to the conclusion that the appellant's waiver of counsel was not made knowingly and intelligently. The "knowing" standard, to the extent it should apply at all, should apply only to a suspect's understanding of his right to counsel. It should not be construed as requiring knowledge of every circumstance that might affect the exercise of that right in a given case.

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

WINSTON E. COCHRAN, JR.
Assistant District Attorney
Harris County, Texas

CALVIN A. HARTMANN
Assistant District Attorney
Harris County, Texas
Chief of the Appellate Section
Counsel of Record

201 Fannin, Suite 200
Houston, Texas 77002
Tel.: 713/221-5826

Attorneys for Petitioner

APPENDIX A

NO. 248-84

Petition for Discretionary Review from the Court of Appeals, Tenth Supreme Judicial District of Texas [HARRIS County]

TOMMY WAYNE DUNN,
Appellant

v.

THE STATE OF TEXAS
Appellee

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

This is an appeal from a conviction of murder. See V.T.C.A. Penal Code, Sec. 19.02(a)(1). The trial court assessed punishment at 99 years confinement in the Texas Department of Corrections, after a bench trial.

On direct appeal the Waco Court of Appeals in an unpublished opinion rejected appellant's contentions that the trial court erred in admitting appellant's written confession into evidence and that the State had failed to sustain its burden of showing that the confession was given knowingly and voluntarily. See Dunn v. State, No. 10-83-100-CR, delivered January 12, 1984.

We granted the appellant's petition for discretionary review in order to determine what appear to be two closely interwoven issues: (a) whether the right of an accused pursuant to Miranda v. Arizona[1] to have counsel

1. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

present during custodial interrogation may be invoked by a party other than the accused; and (b) whether the failure of law enforcement officials to notify the accused that counsel, who has been retained by a third party or parties, and is close at hand, negates the knowing and voluntary nature of the waiver of the right to presence of counsel pursuant to *Miranda* and its progeny? We will reverse the court of appeals.

A brief recitation of the facts of the case is necessary. On the day following his father's death, appellant was contacted by Detective Kent who requested that he come to the Houston Police Department after work. After closing his business, appellant appeared at police headquarters around 6:00 p.m. and was informed by Kent that he was a suspect in his father's murder. He was then given an oral *Miranda* warning. The evidence shows appellant was in his mid-thirties, a high school graduate with some junior college credits, and a businessman. Kent testified he would not have allowed appellant to leave police headquarters until he participated in a lineup, which occurred around 6:30 p.m. The lineup was completed shortly before 7:00 p.m., and appellant returned to the homicide office with Kent, where he was given a second oral warning of rights under *Miranda*. Following three hours of questioning by Kent and Detective Dunn, Kent began to type appellant's three-page confession at 10:35 p.m. on October 13, 1981. After appellant read, corrected and initialed the document, he read and initialed a third *Miranda* warning printed at the top of his confession and signed the confession at 12:17 a.m. on October 14th. At the time he signed his confession, appellant was unaware that police officers had prevented two lawyers from contacting him while he was being questioned.

The attorneys had not arrived at police headquarters on their own initiative. Appellant's wife contacted attorney Schultz at 10:00 p.m. on October 13th and requested that he go to police headquarters to locate her husband and represent his interests. She became concerned after learning from one of appellant's employees that he had gone to police headquarters after closing his business for the day. Schultz, who had previously represented appellant and his wife in a commercial matter, called attorney Schneider, a criminal law specialist, and asked Schneider to accompany him to the police department. According to Schneider, he immediately phoned Detective Dunn at police headquarters around 10:15 p.m. and told Dunn that he "didn't want them to talk to [appellant] while I was not there and I would be there in a few minutes." In his testimony, Detective Dunn did not recall the details of the phone conversation as recounted by Schneider.

The two attorneys arrived at the homicide office shortly before 11:00 p.m. and immediately talked to Detective Cook who issued them a jail "pass" to see appellant. Upon going to the jail area and presenting the pass, the attorneys were told that appellant was not in jail. Schultz phoned appellant's wife to see if she had heard from appellant or determined his whereabouts, while Schneider returned to the homicide office where Lt. Zoch said that appellant was in an adjacent room being questioned. Schultz rejoined Schneider in the homicide office, and they demanded the right to see appellant. When this request was refused, the attorneys requested Zoch inform appellant they were outside if he desired their assistance. This request was also denied. The attorneys then proposed that appellant be given Schultz's business card, which Zoch refused to do.

Zoch had phoned Assistant District Attorney Holleman to inquire whether the attorneys had a right to see appellant. Holleman advised Zoch that if appellant had waived his right to counsel the attorneys did not have the right to interrupt questioning and talk to appellant. Zoch informed Schneider and Schultz that he was denying their request after having "checked it out with the District Attorney's office." Schneider phoned Holleman and requested that he advise police officers to tell appellant that they were there or give appellant the attorney's business card, but Holleman refused. In a last-ditch effort to contact appellant, Schneider used a phone to send telegrams to the police chief, Detective Dunn, Zoch and to appellant, but the telegrams were never delivered. Appellant signed his confession at 12:17 a.m. on October 14th, and the attorneys were allowed to see appellant at approximately 12:30 a.m.

Zoch testified he refused to allow the attorneys to contact appellant because appellant had not asked for legal counsel after being given his *Miranda* warnings, and "I would not allow [the attorneys] to interfere with the investigation at that point." The following portion of Zoch's cross-examination summarizes his reason for refusing the attorneys' requests:

> "Q. So, now, what do you mean by interfere in the investigation?
>
> "A. Well, Detective Kent was conducting an interview with [appellant]. [Appellant] had been advised of his rights and was cooperating. And at that point we saw no reason to upset the boat, so to speak. Now, the gentleman was wanting—he was talking. He was talking freely and willingly, and I saw no point in stopping the investigation at that point.

"Q. You thought that perhaps, if he had an opportunity to consult with his lawyer, that he might break off the statement, is that correct?

"A. That is—yes, sir, that's correct."

Appellant tried unsuccessfully to suppress his confession at a pre-trial hearing.

The court of appeals found: "*Miranda* does not expressly or inferentially require police to inform an accused, who has been given the basic *Miranda* warning, that legal counsel is present at the police station and trying to contact him, before any waiver of his rights under the Fifth Amendment can be deemed knowingly and intelligently made."

SIXTH AMENDMENT CLAIM

Appellant contends, inter alia, that his Sixth Amendment right to counsel was violated by the admission of his confession into evidence. In the instant case, at the time appellant signed his confession, judicial proceedings had not been initiated against him. The mere arrest and subsequent questioning of a person do not constitute a sufficient formalization of proceedings to trigger the requirement of counsel under the Sixth Amendment. The Sixth Amendment right to assistance of counsel does not come into play until "at or after the time adversary judicial proceedings have been initiated against (the accused), 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " See Moore v. Illinois, 434 U.S. 220, 98 S. Ct. 458, 54 L.Ed.2d 424 (1977); Brewer v. Williams, 430 U.S. 387, 398, 97 S. Ct. 1232, 1239, 51 L.Ed.2d 424 (1977), quoting Kirby v. Illinois, 406 U.S. 682, 690, 92 S. Ct. 1877, 1881-83,

32 L.Ed.2d 411, 417, 418 (1972); Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983). Thus, it is only when "the government has committed itself to prosecute" that the defendant is entitled to counsel, *Tarpley v. Estelle,* supra, at 162, under the Sixth Amendment. See also United States v. Dobbs, 711 F.2d 84, 85 (8th Cir. 1983); United States v. Franklin, 704 F.2d 1183, 1189 (10th Cir. 1983); United States v. Guido, 704 F.2d 675, 676 (2d Cir. 1983); Logan v. Shealy, 660 F.2d 1007, 1012 (4th Cir. 1981), cert. denied, 455 U.S. 942, 102 S. Ct. 1435, 71 L.Ed.2d 653 (1982); United States v. Traficant, 558 F.Supp. 993, 996 (N.D. Ohio 1983).

In the instant case, no "judicial proceeding" of any kind had been instituted by the police against appellant, thus no viable Sixth Amendment claim has been demonstrated.

FIFTH AMENDMENT CLAIM

I. INVOCATION OF FIFTH AMENDMENT RIGHTS

Appellant additionally contends that the court below rendered a decision in conflict with other jurisdictions that have addressed the issue of whether a party other than a defendant may invoke the right to counsel under *Miranda,* viz: *Weber v. State,* 457 A.2d 674 (Del. 1983); State v. Matthews, 408 So.2d 1274 (La. 1982); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969); People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709 (1979); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537 (1968); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628 (1963); State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979); Commonwealth v. Hillard, 471 Pa. 318, 370 A.2d 322 (1977).

We are not persuaded by these cases relied upon by appellant because of the following persuasive language found in Fuentes v. Moran, 572 F.Supp. 1461 (D.R.I. 1983), aff'd 733 F.2d 176 (1984); viz: "the sockdolager is simply this: Petitioner's right against self-incrimination is personal; it cannot be invoked or waived by anyone other than the person to whom the right attaches." 572 F.Supp. at 1469. This view is shared by other state jurisdictions, see e.g., State v. Johns, 185 Neb. 590, 177 N.W. 2d 580 (1970); State v. Smith, 294 N.C. 365, 241 S.W.2d 674 (1978); Ohio v. State, 55 Ohio St.2d 237, 378 N.E.2d 1064 (1978); State v. Burbine, 451 A.2d 22 (R.I. 1982).

Of particular significance is the reasoning employed by the Rhode Island Supreme Court in *State v. Burbine,* supra. In *Burbine,* the relevant facts developed thusly:

Police officers who were investigating a homicide received a telephone call from a public defender informing them that the defendant Burbine was represented by another attorney in the public defender's office; these officers were informed that the public defender in question was not available; the officers were informed that the public defender then speaking to them would act as defendant's legal counsel, in the event that the officers intended to place the defendant in a lineup or question him; the officers in question never informed the defendant of this telephone call from the public defender's office; defendant Burbine then proceeded to give three confessions admitting his complicity in the homicide; and the defendant Burbine contended that all three confessions should have been suppressed on the ground that they were obtained in violation of his right to counsel and his privilege against self-incrimination. The Rhode Island

Supreme Court, in finding defendant Burbine's written and verbal waivers of his right to remain silent and his right to counsel knowing and intelligent, observed:

> "Nothing in the Miranda opinion or in succeeding cases has indicated that the right to counsel may be asserted by any one other than the accused. The strength of Miranda lies in its simplicity. It was designed as a set of sharp-bright line directions which police officers could easily follow. It was not dependent on the fortuitous circumstances exhibited in *Escobedo* whose very limited application it transcends and supercedes. Even such a robust exponent of the rights of the accused as Professor Yale Kamisar points out the weak congruence between a defense lawyer's entry into the proceedings and the suspect's need for a lawyer's help:
>
> > " 'Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he "spring[s] to the telephone" hardly seems a rational day of reconciling the interest of the accused with those of society.' [citation omitted].
>
> "Consequently, we are of the opinion that the principals of Miranda place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys." *Burbine* at pg. 28.

As appellant accurately points out, this case presents a case of first impression to this Court on this issue. However, though the factual situation is certainly distinguishable, the ultimate rationale applied in Kelly v. State, 621 S.W.2d 176 (Tex. Cr. App. 1981), is closely akin to that employed in *State v. Burbine,* supra.

In *Kelly,* supra, the defendant and his brother were arrested by Fort Worth police officers and questioned

in reference to a homicide. While in custody, and after being questioned at some length by police officers, the defendant was allowed to visit with his mother and brother for quite some period of time. The defendant's mother made several unsuccessful attempts to contact an attorney in the presence of the defendant and in the presence of the questioning officers. One of the officers (Meyer) testified that he made no effort to assist the defendant's mother in contacting an attorney. After some additional time had passed, the defendant gave a written, signed confession. One of the defendant's contentions at the hearing on his motion to suppress his confession was, although the detective who questioned him was aware of the fact that defendant's mother made at least two unsuccessful attempts to contact an attorney, the detecive nevertheless proceeded to obtain a confession from the defendant. Presiding Judge Onion, writing for this Court and addressing this contention, observed:

> "In applying these rules to the situation presented by Meyer's testimony, we first observe that appellant neither *personally* advised Meyer of his desire to consult an attorney nor *personally* attempted to contact one. We decline to equate an attempt by a member of the family of an accused to contact a lawyer, which is overheard by police officers, with an indication by the *accused* that he desires consultation with counsel prior to any questioning. Appellant's mother may have acted on her own despite the indifference or even opposition of her son. No violation of Miranda, supra, is shown." [emphasis added] *Kelly,* 621 S.W.2d at pg. 180.

We conclude from the rationale employed in *State v. Burbine,* supra, *Kelly,* supra, and *Fuentes v. Moran,* supra, that an accused's right against self-incrimination

is personal, and cannot be invoked or waived by anyone other than the accused.

Closely related, yet distinctly different, from the first Fifth Amendment issue on page 1 ante, is the analysis of the second Fifth Amendment issue presented, viz: whether the failure of law enforcement officials to notify the accused that counsel, who has been retained by a third party or parties and is close at hand, negates the knowing and voluntary nature of the waiver of the right to presence of counsel pursuant to *Miranda*, supra, and its progeny. The analysis of this issue must necessarily begin with the premise that this Court has in the past basically followed the mandates of the Supreme Court of the United States in cases involving custodial interrogation. See, e.g., *Kelly*, supra, including both the state and federal cases chronicled therein. If we decide to depart from the path laid down by the Supreme Court in a case where an accused has not exercised his right to remain silent or his right to counsel, we should "consider the balance of interest between society's need for reasonable law enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination." *State v. Burbine*, at pg. 29.

The cases are legion throughout the various federal circuits to the effect that, notwithstanding the knowledge of law enforcement officials that a suspect is represented by counsel or is planning to engage counsel, questioning may proceed without the attendance or acquiescence of the attorney *so long as a valid waiver has been secured.* [emphasis added.] Hance v. Zant, 696 F.2d 940, 947 (11th Cir. 1983); United States v. Brown, 569 F.2d 236, 238-39 (5th Cir. 1978) (en banc); Moore v. Wolff, 495 F.2d 35, 37 (8th Cir. 1974); United States v. Cobbs,

481 F.2d 196, 199-200 (3rd Cir. 1973), cert. denied, 414 U.S. 980, 94 S. Ct. 298, 38 L.Ed.2d 224 (1973); United States v. Zamora-Yescas, 460 F.2d 1272 (9th Cir. 1972), cert. denied, 409 U.S. 881, 93 S. Ct. 210, 34 L.Ed.2d 136 (1972); United States v. Gordon, 493 F.Supp. 808, 812 (N.D.N.Y. 1980), aff'd on other grounds, 655 F.2d 478 (2d Cir. 1981); see United States v. Monti, 557 F.2d 899, 904 (1st Cir. 1977).

It is axiomatic that the burden of establishing waiver "is on the government and is a heavy one." United States v. Montgomery, 714 F.2d 201, 203-204 (1st Cir. 1983). "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L.Ed.2d 286 (1979).

In the instant case, the question of voluntariness of the waiver is pretty easily settled. The trial court found and the evidence is overwhelming that appellant was admonished of his right to remain silent and of his right to retained or appointed counsel on at least three occasions. There is no evidence that appellant was ignorant, confused, or intimidated. The appellant had not been traumatized by forcible arrest, but instead had come to the police station voluntarily and at his own convenience. Throughout his interview with police, the appellant was cooperative and was described as being "calm, cool and collected." In the face of this evidence, we find that appellant's confession was given voluntarily.

The difficult question, and apparently one of first impression presented to this Court, is whether, given the fact that attorneys hired by appellant's wife were present

seeking to counsel with appellant, the waiver was obtained *knowingly?*

In solving this query, it is necessary for us to examine that "quantum of information necessary for the accused to make an informed decision as to waiver." *State v. Burbine,*[2] at pg. 29.

In his brief, the appellant urges this Court to adopt the per se rule established by the Delaware Supreme Court that "if prior to or during custodial interrogation, and unknown to the suspect, a specifically retained or properly designated lawyer is actually present at a police station seeking an opportunity to render legal advice or assistance to the suspect, and the police intentionally or negligently fail to inform the suspect of that fact, then any statement obtained after the police themselves know of the attorney's efforts to assist the suspect, or any evidence derived from any such statement, is not admissible on any theory that the suspect intelligently and knowingly waived his right to remain silent and his right to counsel, as established by *Miranda,* supra." *Weber v. State,* supra, at pg. 686.

This rule, coupled with the absolutist per se rule adopted in the State of New York in People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), and People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419

---

2. The defendant in *Burbine* is currently litigating the waiver issue presented in this case in the United States Supreme Court, having pursued Federal habeas corpus remedies after losing his appeal in the Rhode Island Supreme Court. See Burbine v. Moran, 589 F.Supp. 1245 (D.R.I. 1984), rev'd, 753 F.2d 178 (1st Cir.), cert. granted, 105 S. Ct. 2319 (1985).

(1976) is not in any way mandated by the Supreme Court in *Miranda,* supra, wherein the formulation of the now axiomatic Miranda "warnings" was followed by the statement "this does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners." *Miranda,* supra, 384 U.S. at 474, 86 S. Ct. at 1628. We therefore specifically decline to accept the invitation of appellant to adopt either the Weber rule or the New York rule.

We believe the more rational approach in assaying the validity of the waiver relied upon by the State, is for this Court to examine all of the pertinent facts and circumstances of the case, including but not limited to the relationship of the suspect to the attorney, the extent of the knowledge possessed by the authorities, the conduct of the authorities, the nature of the lawyers request, and "the background, experience and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

In the instant case, if all the facts and circumstances are "sifted and weighed in determining whether or not a free and sentient waiver of the rights to remain silent and to the presence of an attorney has been effectuated," *Fuentes v. Moran,* 572 F.Supp. at 1470, and specifically, whether appellant made a *knowing* waiver, the following conclusions emerge:

1) The appellant was in the custody of police officers at the time he gave his confession;

2) Attorney Schultz was retained to represent appellant by appellant's wife at a time prior to the giving of the confession;

3) Attorney Schneider was engaged by attorney Schultz. Schneider contacted the homicide division of the Houston Police Department prior to the signing of the confession and advised officers that he had been retained to represent appellant, and instructed an officer that appellant should not be further questioned,

4) Attorneys Schultz and Schneider proceeded to the police station, arriving shortly before 11:00 P.M.

5) The attorneys were told that appellant was in jail; they procured a jail pass card, proceeded to the jail, discovering then that appellant was not in jail;

6) Attorney Schneider returned to the homicide division and was informed that appellant was being questioned in an adjacent room;

7) The attorneys informed Lt. Zoch that they were hired by appellant's wife to represent appellant; they asked Zoch to inform appellant of their presence; Zoch declined; they requested that Zoch give appellant their business cards; Zoch again declined;

8) An assistant district attorney instructed homicide officers that attorneys for appellant would not be allowed access to appellant unless he (appellant) requested their assistance;

9) Attorney Schneider attempted, by telephone, to send telegrams to the police chief, all detectives connected with appellant's case, and to appellant, but the telegrams were never delivered;

10) Appellant signed his confession at 12:17 A.M. the following morning. Attorneys Schneider and Schultz were permitted to see appellant at 12:30 A.M.

11) Lt. Zoch affirmatively testified that he would not allow the attorneys to see appellant because

> appellant was cooperating and "I saw no point in stopping the investigation at that point." When Zoch was asked whether or not he thought a visit from the attorneys would cause appellant to "break off the statement" he replied "yes, sir, that's correct."

The facts and circumstances of the instant case are a far cry from the facts in all of the federal cases chronicled ante at pg. 9-10, and even the cases from the various state jurisdictions herein enumerated. The attorneys hired by appellant's wife in the instant case did everything short of kicking in the interrogation room door to gain access to appellant—at a time when appellant, if given a knowing and intelligent choice, might certainly have opted to remain silent. This unusual chain of events leads us to conclude that:

> "This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary. Were this not so, the proper role of a defense counsel would be meanly diminished. If police officers with a more than warm suspect in their custody were permitted to engage in frustrating dissimulation with impunity, they would have to be more than human to resist the temptation to mislead the suspect and his counsel." Burbine v. Moran, 753 F.2d at 187 (1st Cir. 1985).

Although we have previously found that appellant gave his confession voluntarily, we find from the totality of the above facts and circumstances that appellant did not make an *intelligent and knowing* waiver of his right to consult an attorney and that his confession was obtained in violation of the Fifth Amendment to the United States Constitution and Art. I, Sec. 10 of the Texas Constitution.

The judgment of the court of appeals is reversed and the cause is remanded for a new trial.

CAMPBELL, Judge

Delivered June 26, 1985

En Banc

Onion, P.J., W. C. Davis, White, JJ. dissent

Publish

NO. 248-84

TOMMY WAYNE DUNN, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Tenth Supreme Judicial District of Texas [McLennan County]

CONCURRING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

In determining which way to go to resolve the question apparently of first impression in this Court, whether given the facts of the case appellant knowingly waived his Fifth Amendment rights, the Court should not reject any proposition because not required by the Supreme Court. The fact of the matter is that no rule is in any way "mandated by the Supreme Court in *Miranda*"—save and except the "safeguards" established therein.

The Supreme Court made clear it intended *Miranda* "safeguards" to be minimal, *viz*:

> "Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have that effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right to silence and in assuring a

> continuous opportunity to exercise it, the following safeguards must be observed".

Miranda, 384 U.S. at 467, 86 S. Ct. at 1624.

Therefore, while the Supreme Court disclaimed the notion that its safeguards meant "that each police station must have a 'station house lawyer' present at all times to advise prisoners," the simple truth is that a State is free to provide one should it be thus advised. Accordingly, working *sans* "constitutional straight jacket," this Court quite properly surveys rules and requirements laid down in other jurisdictions.

The majority purports to resort to a consideration of "the balance of interest between society's needs for *reasonable* law enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination,"[1] having gleaned that kind of balancing test from the Rhode Island court in State v. Burbine, 451 A.2d 22, at 29 (R.I. Supr. 1982). However, what it actually does is to pick and choose from among other jurisdictions. Thus it declines "the invitation of appellant to adopt either the Weber rule or the New York rule." I agree we are not ready for the latter. However, the *Weber* rule ought not be rejected out of hand. Unlike an unstructured examination the majority says the Court must make—a totality of circumstances test—when a lawyer is actually present at the police station, as here, a *Weber* rule has a desirable feature of predictability and for that reason may well prove to be more workable for participants in the criminal justice system.

Nevertheless, believing that the instant opinion will not be the last word on this matter of first impression

---

1. All emphasis is mine unless otherwise indicated.

in this Court and agreeing with the eventual finding of the Court that the confession at issue was secured in violation of rights of appellant under Article I, § 10 of the Constitution of the State of Texas, I join the judgment (but not the opinion) of the Court.[2]

CLINTON, Judge

(Delivered June 26, 1985)

EN BANC

PUBLISH

2. Since the Supreme Court has yet to decide the question presented here, I would not presume to provide an answer under the the Fifth Amendment to the Constitution of the United States.

NO. 248-84

TOMMY WAYNE DUNN, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Tenth Supreme Judicial District of Texas [Harris County]

CONCURRING OPINION

I concur in the result the majority opinion reaches, "that appellant did not make an intelligent and knowing waiver of his right to consult an attorney and that his confession was obtained in violation of the Fifth Amendment to the United States Constitution and Art. I, Sec. 10 of the Texas Constitution," but do so reluctantly because there is much mischief in what the majority opinion states, which is why I must write.

It has been said:

> No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his right of self-incrimination.] If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. Justice Goldberg, *Escobedo v. Illinois,* 378 U.S. 478, 490, 84 S. Ct. 1758, 1764, 12 L.Ed.2d 977, (1964).

And that is what this case is all about, whether our criminal justice system is so weak that we must fear that if an accused is permitted to consult with a lawyer

he might become aware of, and exercise, his right of self-incrimination. If our system is that weak, then, as Justice Goldberg said over twenty years ago, see supra, there is something very wrong with our criminal justice system.

The record of this cause reflects that while in his office at the station house, which housed one of the offices of the homicide division in which Tommy Wayne Dunn, appellant, was then being interrogated by C. W. Kent and W. T. Dunn, Lieutenant Norman J. Zoch, who was the supervising officer of Kent and Dunn, told Carl Theodore "Ted" Schultz, III, and Stanley Schneider, two attorneys who had been dispatched to the station house by appellant's wife, "that we were in the process of conducting an investigation and that I would not allow them to see [appellant] at that time because [appellant] had not asked for a lawyer . . . I would not allow them to interfere with the investigation at that point." Zoch also testified that he "thought that perhaps, if [appellant] had an opportunity to consult with [counsel], that he might break off [giving them, the police,] a statement."

And Zoch didn't permit counsel to see or communicate with appellant until after a written confession had been obtained from him. The record reflects that immediately after the interrogation, but after Kent and Dunn had obtained appellant's signature to his written confession, Kent then informed appellant that there were two attorneys who wanted to speak with him. Counsel and appellant then, for the first time, communicated with each other.

Zoch's fear, that "if [appellant] had an opportunity to consult with [counsel], then he, [appellant], might

break off [giving them, the police,] a statement," was well founded because over thirty-five years ago in the concurring opinion that he filed in *Watts v. Indiana,* 338 U.S. 49, 59, 69 S. Ct. 1354, 1357, 93 L.Ed. 1801 (1949), Justice Jackson of the United States Supreme Court made the following observation:

> To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

The questions that are before this Court for resolution are highly important to the citizens of this State, namely, whether this Court will give counsel, who is then lawfully and physically present, the right to communicate with an accused person who is then being detained by the police, and is in police custody; does the accused's right to counsel necessarily include the right of counsel to have access to the accused when he is being detained by and in the custody of the police; and will the actions of state agents, in preventing counsel to communicate with the accused, prevent a waiver by the accused of his right to the assistance of counsel from becoming effective.

These are not simple questions, but, if all are answered by this Court in the affirmative, such will give meaning to the right of the accused to have the assistance of counsel when he is in custody and being detained by the police.

Long ago, the Supreme Court of the United States, see *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed.2d 977 (1964), held that the right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pretrial interrogation, thus rejecting a rule of law that is found in such countries as the Soviet Union, see Feiger, *Justice in Moscow* (1964), 86, that the formal trial will be merely an appeal from the pretrial interrogation. Also see *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

In holding that "we should 'consider the balance of interest between society's need for reasonable law enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination,' " the majority obviously overlooks the fact that our Federal and State constitutions, unlike others, such as the Soviet Union, strikes a balance in favor of the accused. See *Escobedo v. Illinois,* supra, in which the Supreme Court of the United States held: "[W]hen the process shifts from the investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer."

If the accused has the right to the assistance of counsel when he has been accused of committing a criminal wrong, and is then in the custody of the police, which right no one disputes, does this right to the assistance of counsel include the right of counsel to have access to the accused? That is the burning quetsion in this cause. It should be answered in the affirmative, without any reservations, qualifications, or conditions. The majority, however, answers the question in the negative. In doing so, I believe it errs.

A majority of our sister state courts, however, have answered the question in the affirmative. See *Weber v. State,* 457 A.2d 674 (Del. Supr. 1983); *People v. Smith,* 93 Ill. 2d 179, 66 Ill. Dec. 412, 442 N.E.2d 1325 (Ill. Supr. 1982); *State v. Matthews,* 408 So.2d 1274 (La. Supr. 1982); *State v. Haynes,* 288 Or. 59, 602 P.2d 272 (Ore. Supr. 1979); cert. denied, 446 U.S. 945, 100 S. Ct. 1275, 64 L.Ed.2d 802 (1980); *State v. Jones,* 19 Wash. App. 850, 578 P.2d 71 (Wash. Ct. App. 1978); *Commonwealth v. McKenna,* 355 Mass. 313, 244 N.E.2d 560 (Mass. Supr. 1969); *Commonwealth v. Hilliard,* 471 Pa. 318, 370 A.2d 322 (Pa. Supr. 1977).

The majority viewpoint was best expressed by Justice Moore, who authored the opinion for the Delaware Supreme Court in *Weber v. State,* supra: "[I]f prior to or during custodial interrogation, and unknown to the suspect, a specifically retained or properly designated lawyer is actually present at the police station seeking an opportunity to render legal advice or assistance to the suspect, and the police intentionally or negligently fail to inform the suspect of that fact, then any statement obtained after the police themselves know of the attorney's efforts to assist the suspect, or any evidence derived from any such statement, is not admissible on any theory that the suspect intelligently and knowingly waived his right to remain silent and his right to counsel as established by Miranda. . . . " 457 A.2d, at 686. This rule, however, is not without qualification: "To effectively invoke this rule, the attorney must present himself at the police station or other site of interrogation and have a bona fide right within the ambit and limitations of the Code of Professional Responsibility to hold himself out as the suspect's counsel (see DR 2-103 and 2-104)." (686). In this cause, and under-

standably so, the State does not take issue with the fact that both Schultz and Schneider had the lawful right to be at the station house and hold themselves out as counsel for appellant.

The minority viewpoint, which the majority adopts, but which is presently under scrutiny by the Supreme Court of the United States, see *State v. Burbine,* 451 A.2d 22 (R.I. Supr. 1982), aff'd sub. nom. *Burbine v. Moran,* 589 F.Supp. 1245, rev'd *Burbine v. Moran,* 753 F.2d 178 (1st Cir. 1985), cert. granted, see *Moran v. Burbine,* 37 Cr.L. 4057, May 15, 1985, to consider the question "Does the Fifth Amendment's Self-Incrimination Clause require suppression of three confessions, each made after proper Miranda warnings and three valid waivers of rights, solely because an attorney requested by the defendent was given misleading information by a police officer over the telephone that there would be no further interrogation of defendant that night and defendant was not informed of the attorney's telephone call?", holds that the police do not have any duty to inform an accused, who is in their custody and who has received his *Miranda* supra, warning, that counsel is physically present and wants to assist the accused.

The only other state courts which appear to subscribe to the minority viewpoint are those from Nebraska, North Carolina, and Ohio, see *State v. Johns,* 185 Neb. 590, 177 N.W.2d 580 (Neb. Supr. 1970), *State v. Smith,* 294 N.C. 365, 241 S.E.2d 674 (N.C. Supr. 1978), and *Ohio v. Chase,* 55 Ohio St. 237 378 N.Ed.2d 1064 (Ohio Supr. 1978). Federal courts of this Nation, see the cases *cited in State v. McConnell,* 529 S.W.2d 185, 187 (Mo. Ct. App. K.C. 1975), and *Fuentes v. Moran,* 572 F.Supp. 1461, 1469 (D.R.I. 1983), aff'd, *Fuentes v. Moran,* 733

F.2d 176 (1st Cir. 1984), appear to subscribe to the minority viewpoint.

The minority viewpoint has best been expressed by Judge Selya, a federal district court judge, see *Fuentes v. Moran,* supra, as follows: "The sockdolager is simply this: Petitioner's right against self-incrimination is personal; it cannot be invoked or waived by anyone other than the person to whom the right attaches." 572 F.Supp., at 1469.

The majority opinion in this cause relies heavily upon what Judge Selya stated. In doing so, however, the majority overlooks the fact that notwithstanding that *Fuentes v. Moran,* supra, was affirmed by the First Circuit, see supra, that court in *Burbine v. Moran,* supra, held: "[W]e join ranks with a number of other respected courts, indeed apparently all the other state supreme courts that have considered the issue. In all of those cases, like the one at bar, Miranda warnings were duly given, damaging admissions were made, and there was no hint of threats or physical coercion. And in all of those cases the courts held that the failure to inform a suspect in custody that his attorney or an attorney retained for him was seeking to see him vitiated his waiver of his Fifth Amendment right to assistance of counsel at his questioning." 753 F.2d, at 186. The First Circuit further pointed out in *Burbine v. Moran,* supra, that "Fuentes was a close case, narrowly favoring the state," and also pointed out that the attorney in *Fuentes,* supra, only made a "half-hearted, feckless" effort to be of service to the accused, and lastly held that the police conduct in that cause did not sink to the level of trickery.

Thus, in light of the above, it is difficult, if not impossible, to understand how the majority can state that the

federal district court decision of *Fuentes v. Moran,* supra, is "persuasive." Furthermore, it is also difficult, if not impossible, to understand the majority's following holding, "We conclude from the rationale in State v. Burbine, supra, (the State court decision which has been reversed by a federal circuit court of appeals and is presently pending on certiorari before the Supreme Court of the United States, see supra), Kelly v. State, 621 S.W.2d 176 (Tex. Cr. App. 1981) (a panel opinion of this Court, which is not even factually in point to this cause), and *Fuentes v. Moran,* supra, (the federal district court opinion), is closely akin to that employed in State v. Burbine, supra." As to the majority of this Court relying upon a federal district court opinion for authority, see and cf. what this Court stated in *Pruett v. State,* 463 S.W.2d 191, 194 (Tex. Cr. App. 1971).

In this instance, appellant, who had been given his *Miranda,* supra, warning, was unaware that Schultz and Schneider were standing nearby. However, the fact that he might have been indifferent to the abstract offer of counsel by the police, by not then demanding to have the assistance of counsel, does not also mean that he would have disdained the chance to consult with Schultz and Schneider before signing the confession, had they been given the opportunity to consult with him. By preventing Schultz and Schneider from communicating with appellant, the actions of the State's agents in this cause were equivalent to holding appellant incommunicado, which itself is sufficient to void a confession. See *Haynes v. Washington,* 373 U.S. 503, 83 S. Ct. 1336, 10 L.Ed.2d 513 (1963); *Ward v. Texas,* 316 U.S. 547, 62 S. Ct. 1139, 86 L.Ed. 1663 (1942); *Collins v. Beto,* 348 F.2d 823 (5th Cir. 1965).

From the above, it should be obvious that but for the actions by the State's agents in this cause, in preventing Schultz and Schneider from communicating with appellant, appellant would have had "[t]he guiding-hand of counsel" when he was being interrogated by the police. See and cf. *Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932).

I also observe that what the majority opinion states is in conflict with what this Court stated and held in *Hamilton v. State,* 68 Tex. Cr. R. 419, 153 S.W. 331, 336 (Tex. Cr. App. 1913), in which this Court was confronted with a similar situation as at bar. In condemning similar conduct, this Court held that such conduct on the part of the State's agent was "a clear and palpable violation of the Constitution and Bill of Rights."

Furthermore, but long ago, when it was a criminal offense in this State, see former Penal Code Art. 1176, for a custodian of a prisoner to wilfully deny the defendant's attorney the right to see and consult with the defendant, the then Dallas Civil Court of Appeals, in *Wilmans et al. v. Harston,* 234 S.W. 233 (Tex. Civ. App.—Dallas 1921, no writ history), stated the matter this way: "The due and orderly administration of justice requires that the rights and privileges of attorneys who are officers of the courts be protected with zealous care against undue infractions of a nature which are calculated to deny prisoners whom they represent the advice and aid of counsel . . ."

"[A]lthough the state has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by the Constitution." *People v. Rogers,* 397

N.E.2d 709, 713 (Ct. App. New York 1979). Thus, in a reciprocal sense, the right of an attorney to see and consult with his client is the same as the right of the accused to have the assistance of counsel when he is in the custody of the police. "To allow the police to interrogate, and elicit a confession from, a suspect without informing the suspect of his counsel's availability while effectively denying his counsel reasonable access (would not only) promote those 'evils' inherent in the interrogation process which Miranda condemned," see *State v. Burbine,* supra, at 37 (Murray, J., dissenting opinion), but would also amount to "our system of justice permitting the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police." *People v. Donovan,* 13 N.Y.2d 148, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841 (Ct. App. N.Y. 1963).

Not only would I hold in this cause what the majority does, that the State has failed to sustain its heavy burden of proof that appellant knowingly and intelligently waived his right to the assistance of counsel during his custodial interrogation by Kent and Dunn, I would additionally adopt what the Delaware Supreme Court stated and held in *Weber v. State,* supra. To do less, I believe, is to denigrate the accused's constitutional right to counsel.

For all of the above and foregoing reasons, I concur in the result the majority reaches.

TEAGUE, Judge

EN BANC

DELIVERED 6-26-85

PUBLISH

NO. 248-84

TOMMY WAYNE DUNN, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Tenth Supreme Judicial District of Texas [McLENNAN County]

CONCURRING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Addressing the concurring opinions of Judge Clinton and Judge Teague, I find the "Weber rule" unsatisfactory precisely because it is rigorously structured. Predictability aside, I see no advantage to requiring a lawyer to be "actually present at a police station" in every instance. Given the unstructured balancing test of the majority opinion, a suspect's right to remain silent and his right to counsel might compel the police to inform him that "his" attorney is trying to contact him from another state by telephone or is trying to contact him at a different police substation [applicable where the police move the suspect from place to place in order to thwart attempts by outsiders to locate him. See Foster v. State, 677 S.W. 2d 507 (Tex. Cr. App. 1984)], etc.

Rigid rules have the advantage of predictability but also carry the disadvantage of being subject to manipulation. I prefer a test broad enough to grant relief not only in the instant case, but in all other cases equally compelling,

regardless of the physical circumstances. Thus, I join the opinion of the majority.

MILLER, Judge

Delivered: June 26, 1985

En Banc

Publish

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0248-84

STYLE: Dunn, Tommy Wayne

July 24, 1985

On this day the State's Motion for Rehearing was denied. Presiding Judge Onion and Judges W C. Davis, McCormick and White dissent.

COA#: 10-83-00100-CR Thomas Lowe, Clerk

APPENDIX B

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 248-84 styled:

TOMMY WAYNE DUNN, Appellant

v.

STATE OF TEXAS, State

on February 24, 1984, the Appellant's Petition for Discretionary Review of the judgment of the Court of Appeals for the Tenth Supreme Judicial District of Texas was filed with this Court. On June 26, 1985 the Judgment of the Court of Appeals was Reversed and Remanded for a New Trial.

On July 24, 1985 the State's Motion for Rehearing was Denied.

On August 9, 1985 the State's Motion to Stay Mandate was granted for sixty days.

WITNESS my hand and seal of said Court, at my office in Austin, Texas, this 25th day of September, 1985.

/s/ THOMAS LOWE
Thomas Lowe
Clerk of the Court of
Criminal Appeals of Texas
Thomas Lowe